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22 *C. R. Bard, Inc. and*
23 *Bard Peripheral Vascular, Inc.*

13
14 **IN THE UNITED STATES DISTRICT COURT**
15
16 **FOR THE DISTRICT OF ARIZONA**

17 IN RE: Bard IVC Filters Products Liability
18 Litigation,

19 No. 2:15-MD-02641-DGC

20 This Document Relates to:

21 **DEFENDANTS' MOTION IN
22 LIMINE NO. 5 TO EXCLUDE
23 OPINION TESTIMONY OF
24 DR. KANDARPA**

25 Lisa Hyde, et al. v. C. R. Bard, Inc., et al.
26 CV-16-00893-PHX-DGC

27 (Assigned to the Honorable David G.
28 Campbell)

1 Bard moves *in limine* to exclude opinion testimony of Dr. Kandarpa by respectfully
 2 showing the Court as follows:

3 **ARGUMENT AND CITATION OF AUTHORITY**

4 Krishna Kandarpa, MD is an interventional radiologist who worked in 2006 as a
 5 medical monitor on the Everest Study of Bard G2® filters. He has not been identified by
 6 Plaintiffs as an expert witness, nor has he provided a Federal Rule 26(b) report.¹
 7 Dr. Kandarpa is a lay witness who ostensibly is offering testimony as a fact witness
 8 relating to his involvement with the Everest Study. However, in his July 19, 2018
 9 deposition, Plaintiffs elicited expert opinion testimony from the witness that is
 10 inadmissible under Federal Rules of Evidence 701.

11 First, as a lay witness, Dr. Kandarpa may only testify to opinions “which are (a)
 12 rationally based on the perception of the witness, (b) helpful to a clear understanding of
 13 the witness’s testimony or the determination of a fact in issue, and (c) not based on
 14 scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed.
 15 R. Evid. 701. The purpose of Rule 701(c), which prohibits opinion testimony by a lay
 16 witness based on scientific, technical, or otherwise specialized knowledge, is to “eliminate
 17 the risk that the reliability requirements set forth in Rule 702 will be evaded through the
 18 simple expedient of proffering an expert in lay witness clothing.” Fed. R. Evid. 701,
 19 advisory committee’s note to 2000 amendment. Here, Plaintiffs intend to introduce
 20 opinion testimony that goes beyond Dr. Kandarpa’s personal observations and
 21 experience—and far beyond the scope of his knowledge of the Everest Study—in an
 22 attempt to proffer “an expert in lay witness clothing.”

23 There are four principal areas of expert opinion that Plaintiffs attempted to elicit
 24 from Dr. Kandarpa in his deposition that they may attempt to introduce in this case:

25
 26 ¹ Plaintiffs failed to identify this witness in either its disclosures or its responses to
 27 Defendants’ interrogatories, and Plaintiffs did not otherwise make known the identify of
 28 Dr. Kandarpa during discovery. Following the *Jones* trial, this Court concluded that
 “*Hyde* may use Dr. Kandarpa as a witness” because the harm from Plaintiffs’ failure to
 timely disclose him as a witness in the first two trials could be alleviated through taking
 his deposition. *See* Doc. 11871 at 3, ¶ G; Doc. 11320 at 4, ¶ 9.

1 (1) physician expectations, (2) filter design and defect, (3) complication rates, and (4)
 2 alleged interrelatedness among complications.² *See* Ex. A attached hereto for examples of
 3 expert opinions elicited by Plaintiff. These gratuitous expert opinions must be excluded
 4 because Dr. Kandarpa did not form these opinions based on his observations as a medical
 5 monitor of the Everest Study. *See* Fed. R. Evid. 701.

6 For example, when asked “[d]id you form a belief as the medical monitor...”,
 7 Dr. Kandarpa responded, “*I didn’t form – I didn’t form that opinion because of the study.*
 8 It’s something that happens that’s generally known that you don’t want that because these
 9 are the consequences of a migrating filter.” *See* Ex. A, 2018.07.19 Dep. of Kandarpa at
 10 60:4-13 (emphasis added). Necessarily, he has drawn inferences from undisclosed
 11 knowledge bases. Because this testimony “results from process of reasoning which can be
 12 mastered only by specialists in the field[,]” it falls outside the scope of permissible lay
 13 opinion testimony. Fed. R. Evid. 701, advisory committee’s note to 2000 amendment.

14 Second, “the Court should be vigilant to preclude manipulative conduct designed to
 15 thwart the expert disclosure and discovery process.” *See* Fed. R. Evid. 701, advisory
 16 committee’s note to 2000 amendment (quoting Joseph, *Emerging Expert Issues Under the*
 17 *1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108
 18 (1996)). Dr. Kandarpa’s expert opinions were not disclosed in accordance with the
 19 deadlines imposed by this Court so that Bard could have an opportunity to appropriately
 20 discover and potentially challenge them. *See id.* (“there is no good reason to allow what is
 21 essentially surprise expert testimony”). To permit such testimony would subvert the

22 ² Dr. Kandarpa provides expert opinions on the structure, design, strength, and stability of
 23 filters. *See e.g.*, Ex. A, 2018.07.19 Dep. of Kandarpa at 49:18-50:5; 126:1-20. He provides
 24 expert opinions on migration rates being too high. *See id.* at 126:17-24—127:1. He
 25 provides expert opinions on the association of filter complications. *See id.* at 60:4-16.
 26 Yet, Dr. Kandarpa did not provide an expert report, was never disclosed as an expert, and
 27 Defendants have no way of assuring this expert testimony rests on a reliable foundation.
 28 *See Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (Under Rule 702 and *Daubert*,
 expert testimony “is reliable if the knowledge underlying it has a reliable basis in the
 knowledge and experience of the relevant discipline.”). Indeed, Dr. Kandarpa’s
 knowledge and experience in the field of interventional radiology does not provide a
 sufficient foundation for these opinions. *See also* Doc.9434 at 9-11 (order precluding
 disclosed experts from providing similar testimony).

1 requirements of Federal Rule of Civil Procedure 26. *See* Fed. R. Evid. 701, advisory
 2 committee's note to 2000 amendment (Rule 701 "ensures that a party will not evade the
 3 expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 ... by simply calling
 4 an expert witness in the guise of a layperson.").

5 Because Plaintiffs elicited "surprise expert testimony" from Dr. Kandarpa, it must
 6 be excluded. *See Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 824–26
 7 (9th Cir. 2011) (affirming district court's decision to preclude certain experts from
 8 testifying because plaintiff failed to disclose her experts' reports); *Rodriguez v. Gen.*
 9 *Dynamics Armament & Tech. Prod.*, 510 F. App'x 675, 676 (9th Cir. 2013) (plaintiffs
 10 were harmed when defendant's lay witness offered expert opinions because plaintiffs
 11 were not previously provided with the evidence the lay witness relied on in his testimony
 12 and thus plaintiffs were "not afforded the important protections of Federal Rule of Civil
 13 Procedure 26(a)(2)").

14 **CONCLUSION**

15 For these reasons, Bard respectfully requests this Court grant its motion *in limine*.

16 RESPECTFULLY SUBMITTED this 10th day of August, 2018.

17 s/ Richard B. North, Jr.

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Attorneys for Defendants C. R. Bard, Inc. and
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

s/Richard B. North, Jr.
Richard B. North, Jr.